THE HON'BLE SRI JUSTICE N.R.L.NAGESWARA RAO

APPEAL SUIT No. 419 of 1992

JUDGMENT:

The defendants 1 to 3 in O.S.No.169 of 1985 on the file of the Principal Subordinate Judge, Srikakulam, are the appellants herein. The suit was one filed for partition of the schedule properties.

The allegations in the plaint in brief are that one Patnala Apparao and Venkataramanayya were brothers and defendants 1 to 3 are sons of Apparao, whereas Venkataramanayya had no children. They have divided their joint family movables and house property in or about the year 1945 and the landed properties shown in the plaint schedule were kept joint. Venkataramanayya died on 10.07.1947 and Apparao died in the year 1954. Venkataramanayya left behind him, his wife Manikyamma and she inherited his properties and was continued to be in possession and enjoyment of the properties managed by the defendants 1 to 3 jointly. She was being paid the income (ambaram). Manikyamma executed a registered Will on 10.12.1967 in favour of the plaintiff bequeathing the schedule properties and her self-acquired properties, which are shown in plaint A and B schedules and consequently the plaintiff became entitled for the said share. Defendants 1 to 3 have effected a partition by way of registered partition deed on 18.09.1969 and they kept the share of Venkataramanayya separately. Manikyamma died on 16.02.1982 and consequently the plaintiff became entitled to her properties and in spite of demands the defendants have not cooperated and hence, the suit was filed for partition of the schedule properties into two shares and allotment of one such share to the plaintiff and possession with profits.

The defendants 1 to 3 filed a written statement briefly contending that there was a partition of the entire joint family properties including the immovable properties in 1945 and, therefore, there is no truth in the allegations that the properties were joint. The properties were divided keeping in view the good and bad nature of the lands and Venkataramanayya was not given any share in the lands in the village of Komarthi and Patrunivalasa. In the lands at Arasavilli and Patha Srikakulam equal shares were given to the brothers and after the death of Venkataramanayya, Manikyamma was collecting the rents for her share. Therefore, the allegation that the defendants 1 to 3 are managing the land jointly is not correct. It was also further pleaded that the partition deed dated 18.09.1969 relates to the properties that have fallen to the share of Apparao and the allegation that the share of Venkataramanayya was kept separately is not correct. It was further pleaded that in the year 1945 during the lifetime of Venkataramanayya, he has taken the 3rd defendant in adoption and a registered adoption deed was also executed and the 3rd defendant lived with Manikyamma till 1960 and as the differences arose, defendant No.3 came back and lived with his brothers, but still he is the adopted son of Venkataramanayya having half share in the property. The alleged Will in favour of the plaintiff by Manikyamma is also disputed and denied. Therefore, the suit is liable to be dismissed.

On the basis of the above pleadings, the following issues were framed for trial:

1. Whether the plaintiff is entitled to partition and separate possession of the suit schedule properties?
2. Whether the plaintiff is entitled to *mense*

profits as prayed for?

3. Whether the lands in Komarthi and Patrunivalasa, exclusively belong to the defendants 1 to 3 as claimed by them?
4. Whether the Will dated 10.12.1967 executed by Manikyamma, is true, valid and binding on the defendants?
5. Whether the sale deed executed by defendants 1 to 3 in favour of defendant No.4 is valid and binding on the plaintiff?
6. Whether the Court fee paid is not correct?
7. Whether the adoption pleaded by defendant No.3 is true and binding on the plaintiff?
8. To what relief?

On behalf of the plaintiff, P.Ws.1 to 5 were examined and marked Exs.A-1 to A-10 and on behalf of the defendants, D.Ws.1 to 10 were examined and marked Exs.B-1 to B-103 and Exs.X-1 to X-61.

After considering the evidence on record, a preliminary decree for partition was passed by the lower Court for division of plaint A and B schedule properties putting equal shares excluding 2-00 acres of land in item No.1 of plaint A schedule, which was said to have been gifted by his brothers to their sister. Challenging the said judgment, the present appeal is filed. Pending the appeal, A.S.M.P.No.13917 of 1996 was filed to receive additional evidence.

The points that arise for consideration are:

1) Whether there was partition of the immovable properties also in 1945 between brothers as contended by the defendants?

2) Whether the adoption set up by the 3rd defendant is true?

3) Whether the Will said to have been executed by Manikyamma in favour of the plaintiff is true and valid?

4) Whether the judgment and decree passed by the learned Subordinate Judge is legal and sustainable?

POINT NOS.1 to 4:

In order to determine disputes between the parties, it is to be decided as to whether there was a partition of the immovable properties also along with the movable properties. It is not in dispute that Venkataramanayya died in the year 1947 and the partition of the movables, as pleaded by the plaintiff, is in 1945. Generally, a presumption carries that whenever there is a partition, it is a final partition between the parties. Evidently, in this case, the deceased Venkataramanayya died in 1947 and according to the case of the plaintiff, the defendants were in management of the family properties and they have been giving the share to Manikyamma during her lifetime. In order to prove that there was a complete partition, there was no document evidencing the partition of the immovable properties. The fact that the parties are staying in the houses separately is also not in dispute.

According to the case of the defendants, the 3rd defendant, who was examined as D.W.1, has deposed that he was adopted by Manikyamma in 1945 and an adoption deed was executed. His evidence clearly goes to show that the partition of the lands was for receiving ambaram from tenants in equal shares from the respective lands, no partition of lands by metes and bounds took place. According to him, the lands to some extent at Komarthi and Pathrunivalasa lands

exclusively fell to the share of Apparao and the lands belonging to the females were also brought to hatch-pot. According to him, the lands at Arasavilli and Patha Srikakulam fell to the shares of the brothers but more extent was given to Venkataramanayya for the lands at Arasavilli. He also admitted that both the brothers have given 2-00 acres of land to Savithramma at the time of her marriage. He also claimed that during the partition between his brothers in 1967, he gave some properties to his sisters and also mother. Evidently, he was born in 1940 and the adoption is said to be in 1947. He admits that there is no document to show the factual partition and the division by metes and bounds. The 2nd defendant was examined as D.W.2 and his evidence also is on the same lines as that of the 1st defendant. According to him, the partition prolonged till 1947 and finalized in 1947, which fact was not pleaded and evidently by 1947 Venkataramanayya died. Therefore, the probability of partition in 1945 or 1947 is proved to be incorrect. The evidence of D.W.3, who is the sister of the defendants, is also of no use since by the time of the alleged partition, she may not be a member of the family or involved in the partition. As per her own admission while she was aged 13 years, the alleged partition has taken place. The evidence of such witnesses is of no avail. The evidence of D.W.4 will not establish the partition in 1945. The evidence of D.W.5 is that he was a tenant of the item No.3 of the plaint A-schedule property and he was paying the rent or ambaram to the father of defendant No.1 and after the division of the property between the defendants 1 to 3, he paid the rents separately. He does not speak of any partition between the brothers though he claims to be aged about 70 years. Since, evidently, the father of defendants 1 to 3 was in management of the

properties. According to the case of the plaintiff, the mere payment of ambaram by him to the father of defendants 1 to 3 is of no use, so also, the evidence of D.W.6. In fact, there is no material on record to show that the lands, which were allotted to Venkataramanayya were enjoyed and the particulars of the persons, who were cultivating the land and paying ambaram separately to Manikyamma is not proved. There is no record of mutation of the land separately in the name of Apparao and Venkataramanayya and the tax receipts or the pattedar pass books, which were filed, were of later years. Furthermore, if really, the 3rd defendant was taken in adoption and there was partition of the properties, then naturally after the death of Venkataramanayya, a mutation should have been effected in favour of the 3rd defendant. There could not have been any possibility of a partition between the defendants 1 to 3 in the year 1969 under Ex.B-2. There is nothing on record to show that right from 1947, the revenue records reflect separate possession and enjoyment of the property by both the brothers and that the name of either Manikyamma or defendant No.3 as an adopted son, were shown as owner of the property belonging to the share of Venkataramanayya. Therefore, when there is no partition deed and when in all probability after the death of Venkataramanayya in 1947, his brother Apparao or after his death, the defendants 1 to 3 could alone have managed the properties. The nature of evidence to be adduced by the defendants is more and the evidence on record does not show that they have discharged the burden, which is required to establish a partition of the immovable properties and when, evidently, there is no document. Neither any elder of the village nor any neighbour of the lands were examined to prove the alleged partition or separate enjoyment. Therefore, the

finding of the lower Court on this aspect does not call for any interference.

The 3rd defendant sets up a plea of adoption in the year 1945 and Ex.B-92 is said to be the said adoption deed. The lower Court found that this adoption deed is not proved and on the other hand, even after the alleged adoption, there is no proof that the 3rd defendant claimed or recognized as an adopted son of Venkataramanayya. According to the case of the 3rd defendant, till 1961 he lived with Manikyamma and thereafter as the disputes arose, he returned to his brothers and stayed with them. Therefore, it is essential for him to prove that from 1945 till 1961, he is under the care and custody of Manikyamma. No single document is filed to prove that the 3rd defendant lived with Manikyamma and took care of her till the alleged disputes arose in 1961. As rightly found by the lower Court, the school records and his description continued to be as son of Apparao and not as the adopted son of Venkataramanayya. It may be noted that Ex.B-92 is a registered deed of adoption. But, unless and until, the proof of factual adoption is established, mere registration of the adoption deed is not conclusive. The conduct of the 3rd defendant does not fit in with the theory of adoption. There is no proof that the 3rd defendant, as an adopted son of Venkataramanayya, performed the obsequies of Manikyamma. As per the evidence of the 3rd defendant, he was born in 1940. But no other family member was examined to prove the factum of adoption. Additional evidence is sought to be filed to receive the document dated 05.06.1943, whereunder late Venkataramanayya along with his brother and family members sold some property and in that the 3rd defendant is shown as affectionate son of Venkataramanayya. This document is a

registered document, which was available and it was not filed during the course of trial and even otherwise it cannot establish the factum of adoption since by then there was no adoption. As such the said document cannot be received as additional evidence, at this stage. If really, the 3rd defendant was an adopted son and when there is valuable property belonging to Venkataramanayya, no reasonable prudent man would have left the family in 1961 foregoing the rights in immovable property and returning to the original family to claim a right of partition in the properties of his natural father. In fact, no prudent person with a reason would have also accepted such a cause if one is placed in the possession of the defendants 1 and 2. Therefore, the claim of the 3rd defendant that he returned from the family of Manikyamma and the properties between the brothers were divided during 1969 clearly goes to show that the possibility of the adoption is not true and the lower Court has given sufficient reasons to disbelieve that theory and consequently the finding cannot be said to be erroneous.

The next question is as to whether the plaintiff gets the property under the Will executed by Manikyamma. The disputed Will is dated 10.12.1967, which is marked as Ex.A-1 and in order to prove that Will apart from the evidence of P.W.1, who is the beneficiary, the evidence of P.W.2, who is an advocate and one of the attestors, is his father and he identified the signature of his father on Ex.A-1. P.W.3 is also an employee in Agricultural Department and his father is also said to be an attestor on Ex.A-1 and he also identified the signature. Apart from that, it is a registered Will executed by Manikyamma. P.W.5 is also one of the attestors on Ex.A-1 and according to him, it was scribed by one T.Seetharamaiah and he was also said to be present when it was registered.

He was said to be the tenant in the shop of Manikyamma and therefore, she is known to him. The evidence of this witness and also the factum of registration clearly go to show that the Will is probable and true. The fact that has to be noticed is that there is nobody to look after Manikyamma since 1961, the 3rd defendant claims to have left her and Manikyamma was not cared by any of the defendants. Consequently, the plaintiff being her brother, is only the person, who could have taken care of her and there is no suspicious circumstance in execution of the Will. Therefore, the lower Court also rightly accepted the Will in favour of the plaintiff.

From the material evidence on record, the claim of the plaintiff has been rightly accepted by the lower Court and the evidence on record does not establish any of the contentions raised by the defendants and the judgment and decree passed by the learned Principal Subordinate Judge does not call for any interference. Accordingly, the points are answered.

In the result, the Appeal Suit is dismissed. No costs.

N.R.L.NAGESWARA RAO, J

DATE: 17-11-2011
MR

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